

April 9, 2009

CARPENTER HAZLEWOOD DELGADO & WOOD

E-NEWSLETTER

Builders and Developers Are Owners Too By Chad P. Miesen, Esq.

In the last many months, we have watched home prices fall and mortgage terms become less certain. Not only has the challenging economy impacted consumers, but the once-thriving builders and developers ended up with large land inventories and very few sales. That resulted in some builders and developers holding tight to the pocketbook while others took whatever profits were left and abandoned the communities altogether. In either case, these community associations have been left out in the financial cold.

Most CC&Rs are very specific about the financial obligations of these builder/developer entities. In fact, in many cases the builders and developers not only owe assessments, but also have an obligation to subsidize all or some of any shortfall between the community association's income and expenses, usually on a monthly or quarterly basis.

In Arizona, community association directors are burdened with certain duties owed to their members. Among others, an association must: (1) use ordinary care and prudence in managing the property and financial affairs of the community; (2) treat members fairly; and (3) act reasonably in the exercise of their discretionary powers including rulemaking and enforcement. It is important to note that these duties owed by the association board to the members are no different whether the association is under "developer control" or "homeowner control."

In this context it is important to understand that builders and developers are owners too. As such, under present Arizona law, they must be treated fairly but also in the same manner as other individual owners. Most community associations' boards of directors want to comply with these duties, but are concerned about acting against a builder or developer to recover these unpaid assessments and unfulfilled subsidy obligations. Boards have expressed reluctance at "throwing good money at bad," management companies have relationships with builders, and some boards still have builder members. But a Board's reluctance may result in leaving Association money on the table and uncollected, to the detriment of the association.

In our recent experience, we are finding that taking action against a builder or developer for these assessments or other amounts owing the Association often results in payment because those that had the most serious issues are gone. There are many options available to community associations that we have found effective in collecting money from a builder or developer entity. These include recording notices of lien, sending commercial demand letters, or even litigation. As lot or unit owners, builders and developers can be sued for not paying assessments, including foreclosure of the lien. In fact, sometimes litigation is the only way that will bring a builder or developer entity to the table. After all, these entities are often struggling financially themselves and have made a conscious decision to only pay those that "yell" the loudest.

It is clear that associations have an obligation to take some kind of action against a delinquent builder or developer. The real question is what action is appropriate and that will not result in wasteful spending. You will often find in these matters the delinquency is large and the related legal fees are small in comparison. As the appropriate action depends greatly on the association's governing documents and the specific details of the delinquent builder or developer, a community association should discuss the matter with its legal counsel on a case-by-case basis.



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